

**BEFORE THE
U.S. TRADEMARK TRIAL AND APPEAL BOARD**

MR. ERIK STOFFEL

Opposer

v.

NICOLAS STARK COMPUTING, AB

Respondent.

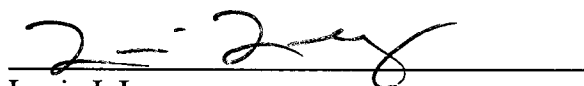
Opposition No. 91162117

Application No. 76/485,376

MOTION TO DISMISS

Respondent, Nicolas Stark Computing, AB, d/b/a Lavasoft ("Lavasoft"), by counsel, respectfully moves that the Board dismiss the Opposition of Erik Stoffel ("Stoffel") for failure to state a claim upon which relief can be granted pursuant to rule 12(b)(6) of the Fed.R.Civ.P. and Rule 503 of the Trademark Trial and Appeal Board ("TTAB") Manual of Procedure ("TBMP"). The Notice of Opposition was mailed to Applicant by the TTAB on September 16, 2004, and this Motion is timely filed within 40 days thereafter. As set forth in the accompanying Memorandum of Points and Authorities in Support of this Motion, Opposer fails to state a claim on which relief can be granted. Accordingly, Respondent moves for dismissal of Opposer's Notice of Opposition and any other relief that the Board deems appropriate.

Respectfully submitted,



Louis J. Levy
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COUNSEL FOR NICOLAS STARK COMPUTING, AB

Dated: October 22, 2004



10-22-2004

**BEFORE THE
U.S. TRADEMARK TRIAL AND APPEAL BOARD**

MR. ERIK STOFFEL	:	
	:	
Opposer	:	
	:	
v.	:	Opposition No. 91162117
	:	
NICOLAS STARK COMPUTING, AB	:	Application No. 76/485,376
	:	
Respondent.	:	

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS**

Respondent, Nicolas Stark Computing, AB, d/b/a Lavasoft ("Lavasoft"), by counsel, submits the following Memorandum of Points and Authorities in Support of its Motion to Dismiss the Opposition of Erik Stoffel ("Stoffel") for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. and Rule 503 of the Trademark Trial and Appeals Board Manual of Procedure ("TBMP").

I. INTRODUCTION

Respondent Lavasoft is one of the world's leading developers of software designed to detect and remove unwanted computer programs – such as spyware, adware, and malware – from computer hard drives.

"Spyware" refers broadly to computer programs that gather user information through the user's Internet connection without his or her knowledge. Internet.com Webopedia, *available at* www.webopedia.com/term/spyware.html (last visited October 22, 2004).

"Adware," is the generic term for "a form of spyware that collects information about a user in order to display advertisements in the user's Web browser based on

information it collects from the user's browsing patterns," often in the form of "pop-up" adds. Internet.com Webopedia, *available at* www.webopedia.com/term/adware/html (last visited October 22, 2004). Opposer admits that "adware" is generic term for this type of software in his Notice of Opposition. See Opposition at ¶1.

"Malware" refers to broad range of malicious programs that damage or disrupt a computer system. Internet.com Webopedia, *available at* www.webopedia.com/term/adware/html (last visited October 22, 2004).

Lavasoft's flagship product is AD-AWARE, the basic version of which is available at no charge to consumers (i.e. "freeware"), has been distributed to consumers in the United States and throughout the world for approximately five years. More advanced paid-for versions of AD-AWARE are also available and sold to individuals, businesses and large institutions. Through extensive distribution and sales throughout the world, Lavasoft's AD-AWARE software has become - on an international basis - one of the leading and most relied-upon products of its kind, as evidenced by the extensive acclaim it has received in the press and the numerous awards it has received, including the Editor's Choice Award from PC Magazine, and the Best Buy award from PC World magazine, among others. Exhibit A.

Opposer's pleading in this matter is inherently contradictory, and indeed invalidates the claimed basis for this Opposition - even when viewed from the perspective that all of the allegations contained therein are presumed true. Opposer admits that the term "adware" is generic, but nonetheless asserts proprietary rights to this term. This cannot be. A generic term such as "adware" is not protectable under U.S. trademark law as a trademark by any entity. Thus, with respect to Opposer's claim under

Section 2(d) of the Lanham Act, Opposer has therefore not pled sufficient facts to support a claim upon which relief can be granted.

Opposer has similarly failed to plead facts sufficient to support his claim that Applicant's mark is descriptive or deceptively misdescriptive. Opposer states only that (1) the term "adware" is generic, Opposition at ¶3, and that the terms "AD" and AWARE" are common terms which, when used in juxtaposition to one another, describe Applicant's products. Opposition at ¶4. Opposer, however, does not allege, nor can he allege, that Applicant's mark AD-AWARE is commonly used, for it is not. Indeed, the term is not in the dictionary and does not have any established meaning. Applicant's mark is a creative play on the word "adware" resulting in the suggestive and inherently distinctive mark AD-AWARE, which has been recognized by consumers as a source designator of Applicant's product for approximately five years and, in fact, is quite well known.

Accordingly, even assuming that all of the allegations as pled by Opposer are true – though Respondent reserves its right to answer and deny the allegations in a formal document should it be necessary to do so – the Opposition fails to state a cause of action against Respondent.

II. ARGUMENT: EVEN WHEN READ IN ITS MOST FAVORABLE LIGHT TO OPPOSER, THE NOTICE OF OPPOSITION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

To state a claim upon which relief can be granted, Opposer must allege that there are valid grounds why the Applicant is not entitled under the law to register the claimed mark. Any defect or deficiency in the application is sufficient to prove a reasonable

ground. Here, there is neither defect nor deficiency with the subject application.

Opposer bases its Opposition on the allegations that a likelihood of confusion will result if Applicant adopts the mark in issue in violation of 15 U.S.C. § 1052(d), Opposition at ¶2, and 15 U.S.C. § 2(e), Opposition at ¶4. Although such violations can serve as bases to oppose, where the allegation is based on Opposer's alleged use of a generic term, and where Applicant's mark is so clearly a suggestive play on this generic term, then the Opposer's claim fails to state a basis upon which relief can be granted.

Here, Opposer claims to have previously used the mark ADWARE, but simultaneously admits that the term "adware" is generic. Opposition at ¶¶ 2-3. Generic terms, by definition, are not protectable as trademarks. See, e.g., In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) and In re Associated Theatre Clubs Co., 9 USPQ2d 1660 (TTAB 1988). See also J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 12:1 (4th ed.). As a matter of law, Opposer cannot claim an exclusive right to use a generic term. Even assuming Applicant was attempting to register the term "adware" rather than "AD-AWARE," Opposer therefore has failed to state a claim upon which relief can be granted with respect to the alleged confusing similarity between the parties' marks.

Also, Opposer has failed to state a claim with respect to the alleged descriptiveness or deceptive misdescriptiveness of Applicant's mark. Opposer states only that "the terms AD Aware are common terms " (*sic*), which when used in juxtaposition to one another describe the product for which Applicant is seeking registration of the term." Opposition at ¶4.

The terms “ad” and “aware” may very well be common terms, but Opposer has not alleged, nor would it be possible for him to truthfully allege, that Applicant’s unitary mark “AD-AWARE” is a commonly used term. Nor does the possibility that the terms AD and AWARE may individually be commonly used have any bearing on the inherent distinctiveness of the unitary mark AD-AWARE. Indeed, Applicant’s mark, which has been recognized by consumers for approximately five years as a designator of source for Applicant’s product, is a creative play on the generic term “adware,” resulting in the coined mark AD-AWARE. This mark does not, in any context, give consumers an immediate idea of the ingredients, qualities, or characteristics of Applicants product, or describe Applicant’s goods with sufficient particularity to be deemed descriptive. See In re TMS Corp. of the Americas, 200 USPQ 57, 59 (TTAB 1978) (MONEY SERVICE held suggestive of financial services).

The courts and the Board customarily recognize that such creative plays on descriptive terms are entitled to trademark protection. See Venetianaire Corp. of America v. A&P Import Co., 302 F. Supp. 156, 163 U.S.P.Q. 412 (S.D.N.Y. 1969), aff’d, 429 F.2d 1079, 167 U.S.P.Q. 481 (2d Cir. 1970) (mark HYGIENT, although a misspelling of term hygienic,” held non-descriptive); In re Grand Metropolitan Foodservice, Inc., 30 U.S.P.Q.2d 1974 (TTAB 1974) (mark MUFFUNS, a misspelling of the generic term “muffins,” deemed inherently distinctive). See also In re Arcturus Engineering, Inc., 2000 TTAB Lexis 642 (September 20, 2000) (not citable as precedent of the TTAB) (CAPSURE, a play on the word “capture,” applied to film carriers used in laser capture microdissection, not descriptive).

Although not binding on the Board, Applicant also notes that the inherent distinctiveness of the mark has already been recognized in several jurisdictions, including the European Union (Reg. No. 003094356), Sweden (Reg. No. 360639) and Australia (Reg. No. 946484) and the U.S. Patent and Trademark Office published Applicant's mark for opposition without ever raising an objection that Applicant's mark was descriptive. Moreover, the question of whether Lavasoft's mark is suggestive or merely descriptive has already been addressed by the Examining Attorney and determined to be suggestive. Opposer pleads no new facts outside those already considered by the USPTO in reaching its decision that the mark is suggestive and registrable.

It appears that Opposer is under the mistaken belief that Lavasoft's registration of its mark will prohibit Opposer from using the term "Adware." Registration of Lavasoft's mark will in no way limit the right of Opposer or any other third party from using the generic term "adware."¹ The argument that it would is patently erroneous and should not be allowed to support an Opposition.

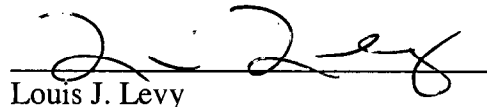
In sum, there must be a reasonable basis to support an opposition based on confusion or descriptiveness. In this case, there is none. Opposer cannot enforce rights in the admittedly generic term "adware." Nor has he alleged facts sufficient to support a claim that that Applicant's mark, which is clearly a creative play on the generic word "adware," is descriptive or deceptively misdescriptive, and therefore not registrable on the Principal Register. Accordingly, Opposer's Notice of Opposition should be dismissed.

¹ Of course, there is no need for a written disclaimer to that effect in this matter—because the term ADWARE is nowhere to be found in Lavasoft's mark.

III. CONCLUSION

For the foregoing reasons, the Board should grant Respondent's Motion to Dismiss the Opposition for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and Rule 503 of the TBMP.

Respectfully submitted.

A handwritten signature in black ink, appearing to read "L. Levy", is written over a horizontal line.

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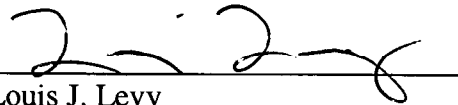
COUNSEL TO NICOLAS STARK
COMPUTING AB

Dated: October 22, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2004 a true and correct copy of the foregoing Motion to Dismiss and the accompanying Memorandum of Points and Authorities in Support thereof were sent by first class mail, postage pre-paid to the following:

Stephen H. Sturgeon, Esquire
Stephen H. Sturgeon & Associates, P.C.
1116 Hurdle Hill Drive
Potomac, Maryland 20854-2526



Louis J. Levy



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Utility	Street price (5/01/02)	Scans memory/storage	Removes programs	Comments
Best Buy Lavasoft Ad-aware Plus 5	\$15	Yes/Yes	Yes	Tool provides extremely thorough scanning and removal of stealthware. Separate utility assists with updating. (★★★★☆)
PestPatrol 3.1	\$30	Yes/Yes	Yes	Utility has a slightly more difficult interface and less-thorough scanning than Ad-aware. Manual updates. (★★★★☆)
Spyblocker Software Spyblocker 5	\$20	Yes/No	No	Real-time memory scanner blocks a broad range of stealthware, ads, cookies, and Web bugs. Separate utility assists with updating. (★★★★☆)
Spybot Search and Destroy .95	Free	Yes/Yes	Yes	Student-written beta freeware offers thorough scanning and an impressive feature set. Manual updates. ¹

¹ Star ratings not assigned for beta software.

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Best Software
Software Product of the Year, Best Freeware



Lavasoft Ad-aware: Ad-supported software (like the sponsored mode of Eudora) has been around for years, but as software companies struggled to survive last year, many took ad support to new heights. That's how adware--software that downloads advertising while you use the associated application or at random--was born. This insidious trade, in which adware skulks onto your hard drive and can invade your privacy online, has proliferated, frustrating more than a few Internet users. Some people call such programs spyware, because in some cases they permit advertisers to continuously monitor your online activities.

There wasn't much anyone could do about adware until Lavasoft created Ad-aware, a simple, free program that scans your computer for the telltale files that adware plants on your system--and deletes them. Ad-aware regularly offers users fresh reference files that enable the program to find the latest spyware to invade their system, much as virus definition files help antivirus software clean up Windows. A one-of-a-kind utility, Ad-aware does its job quickly and efficiently (much to the chagrin of spyware makers), and it has become an indispensable tool in the fight for online privacy.



Best Operating System

Microsoft Windows XP Home Edition (home), Windows 2000 Professional (business): For home users familiar with the Blue Screen of Death in Windows 98 or Me, Windows XP (\$199, \$99 upgrade) is a revelation--an operating system that can go for weeks without crashing. Of course, Windows 2000 Professional (\$319, \$219 upgrade), built on the same core, has offered similar stability for over two years. Windows 2000 makes sense for most businesses, since Microsoft has had more time to work out the kinks in the software. But home users will like XP's compatibility with games and other home apps, and its ability to handle images and audio.

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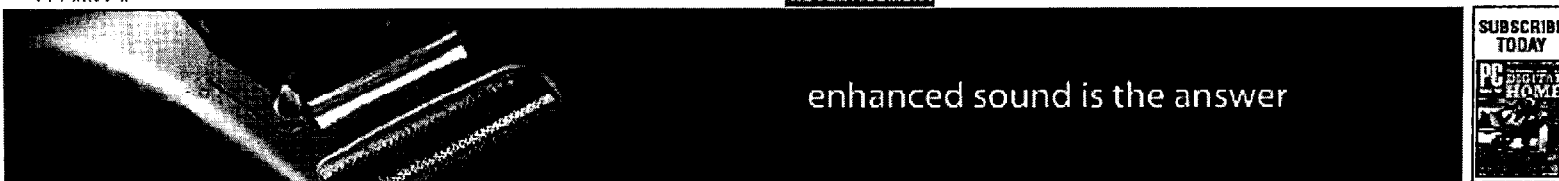
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Lavasoft's Ad-Aware SE series expands the capabilities of this long-established antispyware tool. With its more effective real-time blocking and even more granular configuration options, this is a product that power users are likely to flock to. In addition to the Plus edition we tested, Lavasoft continues to offer its Personal edition (free, but lacking real-time blocking) and a Professional edition (\$39.95 direct), which offers specialized and corporate-oriented features, such as command line automation and support for centralized storage of preferences and log files.

Click here to read the full review for [Ad-Aware SE Plus 1.02](#).

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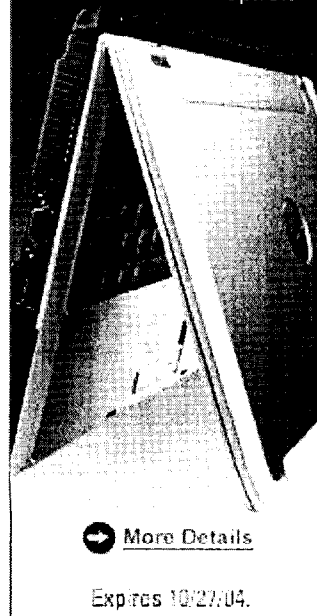
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Lavasoft's Ad-Aware SE series expands the capabilities of this long-established antispyware tool. With its more effective real-time blocking and even more granular configuration options, this is a product that power users are likely to flock to. In addition to the Plus edition we tested, Lavasoft continues to offer its Personal edition (free, but lacking real-time blocking) and a Professional edition (\$39.95 direct), which offers specialized and corporate-oriented features, such as command line automation and support for centralized storage of preferences and log files.

Ad-Aware's Ad-Watch real-time blocking did reasonably well in our testing. In contrast with the other tools reviewed here, whose notifications during downloads of suspect software were spotty at best, Ad-Aware popped up warnings about virtually every dangerous product we installed. In some cases, though, having Ad-Aware attempt to block the installation wasn't entirely effective; the installations proceeded partially and sometimes left the browser unstable and crash-prone afterwards. Despite this problem, few products we've seen have been as consistent about providing immediate feedback about potential threats.

Ad-Aware was also fairly effective at detecting and removing existing spyware. Unlike [Spyware Doctor](#) and [SpySubtract](#), it managed to eliminate the bulk of the annoying pop-up ads appearing while we surfed on one test bed system, for example, but it did leave a few suspect objects running in our system tray.

On the interface side, we particularly like that Ad-Aware offers both a summary view and a detail view of the detected programs, along with useful threat-specific information. Right-clicking on a suspect program or trace brings up a large menu of options for selecting exactly what to quarantine, delete, or ignore, or to perform functions like jumping into a Registry editor to examine a spyware trace in detail.


Power users will delight in Ad-Aware's extensive array of configuration options, logs, and statistics. Ad-Watch even lets you build custom rules to ignore events tied to specific Registry keys and values. Lavasoft says Ad-Aware's scanning engine has been enhanced with features like the ability to detect unknown spyware variants (but not having access to this type of malware, we could not test this claim directly).


Ad-Aware's prevention and removal weren't perfect, but we have yet to see an antispyware product that is. As a weapon against the ever-growing nuisance of spyware and adware, this latest version of Ad-Aware looks better than ever. Just be sure to consider [Spy Sweeper](#), too.


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gowan
October 17, 2004

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Lavasoft doesn't explain the difference between the versions clearly on their site. For some reason, the printed review in PCMag omits this key info as well, but it is included the online review: "In addition to the Plus edition we tested, Lavasoft continues to offer its Personal edition (free, but lacking real-time blocking) and a Professional edition (\$39.95 direct), which offers specialized and corporate-oriented features, such as command line automation and support for centralized storage of preferences and log files."

Hepleris
September 20, 2004

Member rating: ●●●●●

I've used Adaware for years and I install it for all my customers. The old version worked but the SE is better. It doesn't run like a TSR but they have a version that does.

jgarrettjo
September 19, 2004

Member rating: ●●●○○

too difficult to use. i went back to the older version

in this comparison

Editors' Choice	Product	Editor Rating	Member Rating	Check Prices
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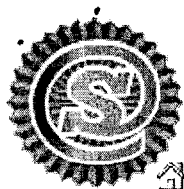


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 Search


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Active Directory Management



Winner
AppManager for AD
[NetIQ]

Finalists

- bv-Control for AD (Bindview Corp.)
- Active Administrator (ScriptLogic, Inc)
- Active Roles (FastLane (division of Quest Softw.))

Active Directory Security



Winner
Directory Security Administrator
[NetIQ]

Finalists

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- Enterprise Directory Reporter (EDR) (Aelita)
- DirectoryLockdown (Netpro)
- Directory Inspector (Sunbelt Software)

Anti-spam Tools for Servers



Winner
iHateSpam Server
[Sunbelt Software]

Finalists

- GFIMailEssentials (GFI Software)
- SpamKiller (McAfee)
- MailMarshal (NetIQ)

Anti-Spyware Tools



Winner
Ad-aware
[Lavasoft]

Finalists

- PestPatrol Corporate Edition (PestPatrol, Inc)
- Spybot Search & Destroy (PepiMK Software)
- Spy Sweeper (Webroot)

Anti-Virus Tools